

**APPENDIX**  
**(Excerpts from the Court of Criminal Appeals' Decision)**  
Filed April 17, 2001

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

**STATE OF TENNESSEE v. VINCENT C. SIMS**

**Direct Appeal from the Criminal Court for Shelby County  
No. 96-09279, 80 Joseph B. Dailey, Judge**

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**No. W1998-00634-CCA-R3-DD - Decided March 14, 2000**

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**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed.**

WOODALL, J. delivered the opinion of the court, in which HAYES, J. and RILEY, J. joined.

W. Mark Ward and Tony N. Brayton, Memphis, Tennessee, for the appellant, Vincent C. Sims.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, Amy L. Tarkington, Senior Counsel, William L. Gibbons, District Attorney General, James M. Lammey and Lee V. Coffee, Assistant District Attorneys General, for the appellee, State of Tennessee.

## OPINION

**(Deleted Summary of Testimony)**

**(Deleted Discussion of Sufficiency of Evidence of Premeditation)**

**(Deleted Discussion of Jury Instructions on Self-Defense)**

### **JURY INSTRUCTIONS ON LESSER-INCLUDED OFFENSES**

The defendant contends that the trial court erred by failing to instruct the jury on voluntary manslaughter and criminally negligent homicide as lesser-included or lesser grade offenses. Moreover, the defendant submits that failure to so instruct was not harmless error.

Under State v. Trusty, 919 S.W.2d 305 (Tenn. 1996), a defendant was entitled to jury instructions on lesser-included offenses and lesser grades or classes of the offense charged if the evidence would support a conviction for the offense. Id. at 311. Recently, our Supreme Court overruled Trusty to the extent that it recognized “lesser grade” offenses as distinct from lesser-included offenses and permitted convictions of “lesser grade” offenses that were not lesser-included offenses embraced by the indictment. State v. Dominy, 6 S.W.3d 472, 473 (Tenn. 1999). See also, State v. Burns, 6 S.W.3d 453 (Tenn. 1999). Under the new case law, a defendant is only entitled to instructions on lesser-included offenses. The definition of lesser-included offense is set forth in State v. Burns:

An offense is a lesser-included offense if:

(a) all of its statutory elements are included within the statutory elements of the offense charged; or

(b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing

(1) a different mental state indicating a lesser kind of culpability; and/or

(2) a less serious harm or risk of harm to the same person, property or public interest; or

(c) it consists of

(1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Burns, 6 S.W.3d at 466–67.

Voluntary manslaughter is defined as the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. Tenn. Code Ann. § 39-13-211(a) (1991 Repl.). Under the new test, voluntary manslaughter would be a lesser-included offense of first-degree murder. Specifically, its statutory elements fail to meet the definition of first-degree murder in part only in the respect that it contains a statutory element establishing a different mental state indicating a lesser kind of culpability. Burns, 6 S.W.3d at 466–67. See also, Dominy, 6 S.W.3d at 477, n. 9.

Criminally negligent homicide, defined as criminally negligent conduct which results in death, Tennessee Code Annotated section 39-13-212 (1991 Repl.), is also a lesser-included offense. See Burns, 6 S.W.3d at 466–67. Compare, State v. Lynn, 924 S.W.2d 892, 899 (Tenn. 1996) (criminally negligent homicide is lesser-included offense of second-degree murder).

Having determined that voluntary manslaughter and criminally negligent homicide are both lesser-included offenses, the next inquiry is whether the evidence justified a jury instruction on such lesser offenses. Burns, 6 S.W.3d at 467. The Supreme Court has set forth a two-part test. First, the trial court must determine whether “any evidence exists that reasonable minds could accept as to the lesser-included offense.” In making this determination, the trial court must “view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence.” Id. at 469. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense. Id.

In the present case, there is no evidence in the record supporting the existence of these lesser-included offenses, and the trial court did not err by refusing to instruct the jury on either. Moreover, even if it was error not to instruct the jury on voluntary manslaughter and negligent homicide, such error was harmless. Our Supreme Court has stated that error associated with the trial court's failure to instruct a lesser-included offense is harmless when the jury finds the defendant guilty of the greater offense and declines to convict the defendant of other lesser-included offenses that were instructed by the trial court and that are greater offenses than the one requested. State v. Williams, 977 S.W.2d 101, 106-108 (Tenn. 1998). See also, State v. Atkins, 681 S.W.2d 571, 577 (Tenn. Crim. App.1984). In the present case, the sequential instructions to the jury included a charge on second-degree murder, and the jury concluded that the defendant was guilty of premeditated first-

degree murder beyond a reasonable doubt. Accordingly, under Williams, any error in declining to give instructions on voluntary manslaughter and criminally negligent homicide would be harmless beyond a reasonable doubt. This issue is without merit.

### **JURY INSTRUCTION ON FELONY-MURDER**

The defendant contends that the trial court erred by granting the state's special request that the jury be instructed that a felony participant is responsible for any death that ensues as a result of the felony. Specifically, he asserts that the trial court took no precautions to ensure the limited applicability of the instruction to the charge of felony-murder, and thus, the jury could have believed that the state did not have to prove mens rea for the charge of premeditated murder. We disagree.

It appears that the trial court instructed the jury first on premeditated murder. The jury was then instructed on murder during the perpetration of a burglary, on murder during the perpetration of a theft, and theft of property. At the end of these instructions, the trial court gave the following charge:

When one enters into a scheme with others to commit a burglary or a theft and a killing ensues, all participants in the burglary or theft may be held responsible for the death, regardless of who actually committed the murder and whether the killing was specifically contemplated by the others.

As long as the defendant intended to commit the burglary or theft and a killing resulted during the attempt to perpetrate the burglary or theft, each defendant is responsible for the murder, regardless of whether he intended for the victim to die or participated in the act of murder.

Thereafter, the trial court instructed the jury on second-degree murder. The trial court also gave a criminal responsibility instruction later in the charge.

The defendant's argument that the trial court failed to limit the instruction to the felony-murder charge and thus, eliminated the state's responsibility to prove mens rea on the premeditated murder charge is without merit. First, the trial court specifically instructed the jury on the elements of premeditated murder, and the jury is presumed to have followed the trial court's instruction. State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998). Moreover, a challenge to a single jury instruction must be judged in context of the entire jury charge. See Cupp v. Naughten, 414 U.S. 141, 146-147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); State v. Bolin, 678 S.W.2d 40, 43 (Tenn. 1984). In the present case, the contested instruction, albeit unnecessary, was given in conjunction with the felony-murder instructions, and in the context of the entire jury charge, we find that the special instruction was not error.

**(Deleted Discussion of "Prior Violent Felony" Aggravating Circumstance)**

**(Deleted Discussion of Impeachment of Mitigation Witnesses)**

**(Deleted Discussion of Hearsay Evidence During Sentencing Hearing)**

**(Deleted Discussion of Prosecutorial Misconduct)**

**(Deleted Discussion of Heinous, Atrocious, or Cruel Aggravating Circumstance)**

## **CONSTITUTIONALITY OF THE DEATH PENALTY STATUTES**

While acknowledging that our Supreme Court has upheld the constitutionality of the death penalty statutes, the appellant raises several issues regarding the constitutionality of the death penalty in order to preserve them for later review.

All of the issues raised have been rejected repeatedly by our Supreme Court. See e.g., State v. Keen, 926 S.W.2d 727, 741-44 (Tenn. 1994); State v. Smith, 893 S.W.2d 908, 926 (Tenn. 1994); State v. Brimmer, 876 S.W.2d 75, 86-88 (Tenn. 1994); State v. Cazes, 875 S.W.2d 253, 268-70 (Tenn. 1994); State v. Smith, 857 S.W.2d 1, 21-24 (Tenn. 1993); State v. Black, 815 S.W.2d 166, 178-79 (Tenn. 1991); State v. Boyd, 797 S.W.2d 589, 599 (Tenn. 1990); State v. Teel, 793 S.W.2d 236, 251 (Tenn. 1990); State v. Thompson, 768 S.W.2d 239, 252 (Tenn. 1989).

**(Deleted Discussion of Proportionality Review)**

## **CONCLUSION**

In conclusion, we find that the evidence is sufficient to support the jury's finding that the defendant is guilty of premeditated murder. While error occurred during the trial, we have carefully reviewed the record and have concluded that such error did not affect the verdict. We also find the evidence sufficient to support the sentence of death. Again, while error occurred during the sentencing hearing, we find that such error was harmless and did not affect the jury's verdict. Moreover, we have conducted a comparative proportionality review and have determined that the sentence of death in this case is neither excessive nor disproportionate to the penalty imposed in similar cases. Finally, although not raised, we have reviewed the record and find that the evidence is sufficient to support the defendant's conviction for especially aggravated burglary.

Accordingly, we affirm the defendant's convictions of premeditated murder and especially aggravated burglary, and we affirm his sentence of death.